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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

New York, N.Y.

v.

23 Cr. 307 (LJL)

BRUCE GARELICK,

Defendant.

Conference

April 17, 2024
10:10 a.m.

Before:

HON. LEWIS J. LIMAN,

District Judge

APPEARANCES

DAMIAN WILLIAMS

United States Attorney for the
Southern District of New York

BY: ELIZABETH A. HANFT

MATTHEW R. SHAHABIAN

DANIEL G. NESSIM

Assistant United States Attorneys

SHAPIRO ARATO BACH, LLP

Attorney for Defendant Garelick

BY: ALEXANDRA A. E. SHAPIRO

JONATHAN BACH

JULIAN S. BROD

JASON A. DRISCOLL

Also Present:

Special Agent Marc Troiano, FBI

O5h2Gar1

(Case called)

THE DEPUTY CLERK: Starting with counsel for the government, please state your appearance for the record.

MR. SHAHABIAN: Good morning, your Honor. Matt Shahabian, appearing for the government, and with me at counsel table is Elizabeth Hanft and Daniel Nessim, as well as Special Agent Mark Troiano from the F.B.I.

THE COURT: Good morning.

MS. SHAPIRO: Good morning, your Honor. Alexandra Shapiro, and with me at counsel table are Jonathan Bach, Julian Brod, and Jason Driscoll and our client, Mr. Garelick, seated to my left.

THE COURT: Good morning.

Okay. We are here for the final pretrial conference. The trial is scheduled to start on the 29th. I thought I would go through some preliminaries with you, then I may want to have some argument with respect to the motions *in limine* and try to resolve as many of them as possible today, and then entertain any questions the parties have or any points that they want to raise.

At this point I would expect that the government has already produced its witness list and list of exhibits, and I will want to hear something about the witnesses as well.

So in terms of logistics, my plan is we will start first thing on April 29 with jury selection. You should all be

O5h2Gar1

1 here at 9:00 in the morning. I will get to, in a moment, and
2 after I hear from counsel for the defense, whether we will use
3 a jury questionnaire. I will tell you right now that I am
4 predisposed against it, but I will hear from the defense with
5 respect to it.

6 But we will select a jury on the morning of the 29th.
7 My plan, unless anybody persuades me otherwise, is to select
8 14 jurors, so the 12 jurors plus two alternates, and the
9 parties will have -- the defense will have ten peremptory
10 challenges and the government six peremptory challenges with
11 respect to the jurors and then one each with respect to the
12 alternates.

13 We will sit every day from 9 until 5, taking a
14 mid-morning break and a mid-afternoon break which will probably
15 be somewhere from 10 to 15 minutes, and then the customary
16 lunch break for about an hour at around 1:00.

17 My plan is to ask you to be able to address some
18 questions with respect to the charge probably after the first
19 day of trial, and then there may need to be some continued
20 argument with respect to the charge before we get to the final
21 charge conference.

22 I would like the parties to use the overhead projector
23 rather than to approach the witness with exhibits. I wouldn't
24 expect that there would be any reason to do it otherwise in
25 this case. When I say the overhead projector, I don't mean to

O5h2Gar1

1 exclude counsel using their laptop to project exhibits. You
2 have both tried a number of cases in this courtroom. If you
3 need practice with respect to the technology, work it out with
4 my courtroom deputy, but my expectation is that until an
5 exhibit is received into evidence, it is only displayed to the
6 Court, opposing counsel and, if appropriate, to the witness.

7 How long does the government want for its opening
8 statement?

9 MR. SHAHABIAN: No more than 20 minutes, your Honor.

10 THE COURT: Ms. Shapiro, Mr. Bach?

11 MR. BACH: We anticipate less than an hour, probably
12 closer to 20 minutes. I haven't drafted the opening statement
13 yet, so I don't know.

14 THE COURT: I would ask both sides to try to keep it
15 to 30 minutes. If you need more than 30 minutes, let me know,
16 but I would hope that you would be able to keep it to 30
17 minutes.

18 That's what I've got in terms of the preliminaries. I
19 gather the issue of 404(b) evidence is now moot. Is that
20 right, Mr. Shahabian?

21 MR. SHAHABIAN: That's correct, your Honor.

22 THE COURT: So the motion with respect to 404(b)
23 evidence is denied as moot since the government is not going to
24 offer evidence with respect to the failure to file a tax return
25 with respect to the trades at issue.

O5h2Gar1

1 Mr. Bach or Ms. Shapiro or Mr. Brod, do you want to
2 try to convince me with respect to the jury questionnaire.

3 MS. SHAPIRO: Mr. Brod is going to address that, your
4 Honor.

5 THE COURT: Okay.

6 MR. BROD: I will take a shot at that, Judge.

7 Judge, I don't want to replay the points that are
8 already in the papers and didn't convince you so far, but I
9 just wanted to respond to several points that the government
10 made in their letter.

11 The first point regards efficiency and, in our view,
12 this is not an inefficient means of selecting a jury. In fact,
13 quite the opposite. It allows the parties to review the
14 responses, if necessary, overnight, the parties can agree on
15 joint strikes, and there are inevitably a number of jurors both
16 parties will agree should not sit, and then jury selection will
17 proceed either, if it's possible to review the questionnaires,
18 during the first day or the following day.

19 And I would note that Ms. Shapiro and I tried a case
20 in this courthouse several years ago in front of Judge Wood
21 where Judge Wood ordered the use of a questionnaire which I
22 think at the time both parties found hugely useful. We were
23 able to excuse a number of jurors by essentially joint strike
24 just going over it overnight and then proceed to ordinary jury
25 selection the following day.

O5h2Gar1

1 The government's second point is that the defense is
2 trying to politicize the trial. Quite the opposite. There
3 are, I think, two or three questions in the questionnaire that
4 relate to whether jurors could be fair to somebody who was
5 associated with a company that became what is now known as
6 Truth Social. This is a highly politicized, indeed, somewhat
7 febrile atmosphere.

8 THE COURT: Somewhat what atmosphere?

9 MR. BACH: I said febrile, but it's a highly
10 politicized, highly divisive atmosphere at the moment.
11 Mr. Trump will be on trial across the street. I just don't
12 think I need to belabor the point that there will be certain
13 jurors who --

14 THE COURT: You may need to belabor the point because
15 aside from the fact that Mr. Trump's name may be mentioned and
16 the name of the target was Trump Media, how do you expect
17 whether a juror likes or dislikes Mr. Trump to be relevant in
18 this case.

19 MR. BROD: Judge, even -- and we just received the
20 government's proposed exhibits, proposed exhibits late last
21 night, so we haven't reviewed all of them, but even just
22 flicking through them it is clear that there will be
23 photographs of Mr. Trump signing documents.

24 This is the SPAC that injected approximately 300
25 million into the company that became Truth Social. There have

O5h2Gar1

1 been very, very extensive -- there has been very extensive
2 media coverage of the way in which the SPAC enabled
3 Truth Social to become a public company, the way in which it
4 may put billions of dollars . . .

5 (Counsel confer)

6 MR. BROD: The way in which it put billions of
7 dollars, or may put billions of dollars, into the pockets of
8 the former president.

9 And I would note that news coverage has been
10 continuing right up until yesterday. In fact, as I was coming
11 home from the office yesterday -- as I was coming home from the
12 office yesterday, the front of the business section was a story
13 about the continuing decline of the DJT stock because the
14 company had made SEC filings showing that it was going to
15 permit warrant holders to exercise their warrants.

16 The government's witness list indicates they are going
17 to call Andy Dean Litinsky, who was one of the two original
18 founders of Trump Media, extensively involved in discussions
19 throughout this relevant period, essentially for the Trump side
20 of this. So the idea that Trump won't be a focus of this trial
21 is simply wrong.

22 So I just don't think the Court can overlook the fact
23 that this is not an ordinary insider trading case. It's not
24 ordinary because most insider trading cases involve stocks that
25 nobody cares about and defendants who nobody has heard about.

O5h2Gar1

1 In this case, we have a stock that is very much in the news and
2 will be in the news probably every day, at least every week, up
3 until the point of trial and not just the *Financial Times* or
4 the *Wall Street Journal*, but CBS, ABC. If you Google the stock
5 today, you will see innumerable stories.

6 And then, of course, the defendant, rightly or
7 wrongly, will be associated with this company. So I would say
8 your Honor we will have a number of jurors who will hear Trump,
9 they will hear insider trading, and they will say, well, that's
10 it, I hardly need to hear more.

11 THE COURT: Let me hear from the government.

12 MS. HANFT: Yes. Thank you, your Honor.

13 The government submits that the Court is entirely
14 capable of sussing out such potential prejudice in an ordinary
15 oral *voir dire* in this case. Very, very high publicity cases
16 in this district happen all the time and the Courts
17 primarily --

18 THE COURT: Let me focus you, Ms. Hanft.

19 Can you respond to Mr. Brod's argument that Mr. Trump
20 and Truth Social will be a focus in this trial and that
21 therefore I need to ask questions about Truth Social and
22 Mr. Trump? And how was Mr. Trump and the target going to play
23 a role in this case?

24 MS. HANFT: I think your Honor had it right in that,
25 of course, it will come up, Truth Social and Trump Media &

O5h2Gar1

1 Technology Group will come up because, of course, that was the
2 target of DWAC and the SPAC, but it is collateral to the case.

3 There will be some testimony, for example, of -- you
4 know, Mr. Brod mentioned that we will call Andy Litinsky who
5 was one of the founders of Trump Media. But Trump himself will
6 play a very, very minor role in the trial, and so we submit
7 that that evidence is collateral and will be very limited and
8 that it is not a focal point at all of the trial.

9 THE COURT: What if -- Mr. Bach, sit down. You will
10 have an opportunity to speak. Actually, Mr. Brod will have an
11 opportunity to speak. So why don't you pass whatever you were
12 going to say in a note to him.

13 Ms. Hanft, what do you have to say about the notion
14 that if a potential juror might think, well, the IPO was
15 funneling money to Mr. Trump and I don't like Mr. Trump, and
16 Mr. Garelick was involved in something that funneled money, in
17 fact, he invested in a vehicle that funneled money to
18 Mr. Trump, helped enrich Mr. Trump, the argument might be made
19 and therefore that juror might be biased in this case against
20 Mr. Garelick with respect to the insider trading charges.

21 MS. HANFT: Well, first of all, your Honor --

22 THE COURT: It might be, therefore, not just bias, but
23 unable to be fair and impartial.

24 MS. HANFT: Yes. Your Honor, I think that's certainly
25 a question that the Court could ask at *voir dire*, but I don't

O5h2Gar1

1 think it's the extreme -- sort of the extreme remedy of a jury
2 questionnaire is necessary here.

3 There is nothing particularly unusual or explosive
4 about this case as compared to many other cases that have been
5 tried in this district where the Courts have not employed a
6 jury questionnaire. Mr. Brod cited to just one circumstance
7 and represented that both parties were quite pleased with the
8 outcome, and I don't know on what basis he is speaking for the
9 government, but --

10 THE COURT: Frankly, that's a little bit irrelevant to
11 me, because there are plenty of cases where judges are very
12 happy not using questionnaires and everybody is quite happy
13 with it anyway. So you don't need to respond.

14 MS. HANFT: And I think the point is, Judge, it's just
15 very clear that this will prolong jury selection. That's the
16 government's main point. And Mr. Brod even essentially
17 conceded as much by pointing out that we will likely need to
18 at least review the questionnaires overnight. This will at
19 least make jury selection last two days. Your Honor was
20 speaking as if, you know, trial would proceed on day one, and
21 so we think that a jury questionnaire just unnecessarily
22 prolongs the process here and is completely not necessary.

23 THE COURT: All right. Mr. Brod, you have whatever
24 you were going to say.

25 Sorry, Ms. Hanft.

O5h2Gar1

1 MS. HANFT: One other thing I wanted to say in
2 response to the Court's question, which is that the
3 government's witnesses will of course also -- we will be
4 calling witnesses who sat on the board of DWAC. We will be
5 calling a witness who is one of the founders of Trump Media &
6 Technology Group. So, you know, obviously to the extent some
7 juror inappropriately discredits the defendant here, perhaps
8 they would do the same for the witnesses. So we submit that it
9 is important to, of course, weed out any juror who can't be
10 fair and impartial, but we don't think a jury questionnaire is
11 necessary.

12 THE COURT: Okay. Mr. Brod.

13 MS. HANFT: Just one moment, your Honor. I'm sorry.

14 (Counsel confer)

15 MS. HANFT: Thank you, your Honor.

16 THE COURT: Mr. Brod, before you speak, I should make
17 it clear, if there is any doubt, that my expectation is with
18 respect to arguments, one lawyer is going to argue for each
19 side and with respect to objections and questioning witnesses,
20 one lawyer for each side. So there is not going to be a
21 cacophony of objections from whichever side is not asking the
22 questions, just the lawyer who is responsible for that
23 particular witness. That rule will continue.

24 MR. BACH: I apologize. I know the custom, and if I
25 misstep, apologies to the Court and to Mr. Brod.

O5h2Gar1

1 MR. BROD: Understood, Judge.

2 So this is going to be a trial, Judge,
3 notwithstanding what Ms. Hanft said, in which the jurors are
4 going to hear about Trump from day one through whenever we
5 finish a week later. Witness after witness is going to come
6 in and talk about a venture, several ventures which were aimed
7 at and which ultimately resulted in a SPAC that merged in
8 Truth Social. The jurors are going to see evidence in the form
9 of e-mails and messages that Mr. Garelick was excited to be
10 associated with this venture. It goes without saying that in
11 this political environment and perhaps particularly in this
12 district, there are going to be jurors who cannot simply be
13 fair.

14 Anecdotally, as I was going to work yesterday, I ran
15 into a neighbor who said, What are you working on? I said,
16 It's the insider trading case that came out of the Trump SPAC.
17 And his words to me, knowing nothing else about the case, Well,
18 that's probably an open-and-shut case.

19 So we think a questionnaire, which is different from
20 *voir dire* and in a crucial way --

21 THE COURT: Did they think it was open and shut for
22 you or for the government?

23 MR. BROD: Well, Judge, I would be speculating and
24 making an assumption if I inquired into it, but I'm pretty
25 clear that he thought the combination of insider trading, high

O5h2Gar1

1 finance, which some people have a prejudice against --

2 THE COURT: I thought your friends had greater
3 confidence in you, but I got the argument.

4 MR. BROD: One last point, which is, questionnaires
5 are different from *voir dire* in a crucial respect, which is
6 that jurors can, in semi privacy, reflect on the questions and
7 give their full answers. We think that particularly in this
8 case a questionnaire will allow us to pick a fair jury so that
9 Mr. Garelick can receive the fair trial that he deserves.

10 THE COURT: Okay. All right. I'm going to deny the
11 request for a questionnaire, but I am going to gear my *voir*
12 *dire* to the concerns that the parties have addressed and I'm
13 going to solicit the parties' help with respect to that.

14 I am denying the request for the questionnaire for
15 several reasons.

16 First, it will prolong the *voir dire*;

17 Second, in my judgment, a questionnaire is not
18 necessary to determine whether a juror can be fair and
19 impartial in this case, and the questions that I ask should be
20 sufficient to determine whether the jurors are fair and
21 impartial.

22 The third point ties into the second point, which is
23 that, in determining whether a juror can be fair and impartial,
24 it's been my experience, and I think the experience of other
25 judges in this Court, that the best way to do so, while also

O5h2Gar1

1 ensuring a fair cross-section, is to ask questions directly to
2 the jurors. Questionnaires present dangers other than the one
3 of delay, and it does tie into the point that Mr. Brod just
4 made. It is not unheard of for jurors to want to get out of
5 jury service. A juror questionnaire does provide a ready and
6 easy opportunity for a person who might be clever to try to get
7 out of jury duty when a person who is either less clever or
8 perhaps a little bit less willing to be duplicitous might not
9 be able to do that, and it is just an equalizing way of being
10 able to ask every juror straight-on questions that are designed
11 to suss out to determine whether a juror can be fair and
12 impartial.

13 That said, there are a couple of things that I plan to
14 do, absent convincing objection, to address the concerns that
15 Mr. Brod mentioned.

16 I usually give an instruction after I select the jury
17 about access to the media and I usually also tell the jurors
18 that as part of my preliminary instructions before we even get
19 to questioning the jurors. I have in mind giving the jurors --
20 telling the jurors as part of my questioning that one of the
21 instructions that I am going to give them is that during the
22 course of the trial if they are selected as a juror they are
23 not to communicate with anybody about the case, even close
24 friends or family, and they are not to do any research about
25 the case or any issues in the case, including by going on

O5h2Gar1

1 social media or the Internet, and to ask whether any juror
2 would have trouble following that instruction. I would expect
3 that the jurors will all say no, that they will not have
4 trouble. If a juror said yes, that would, in my mind, provide
5 grounds for excusing the juror. And simply asking the question
6 is intended to reinforce the point that jurors are going to be
7 instructed not to look at anything. The wording of the
8 question I will work out.

9 The second thing that I intend to ask the jurors, and
10 I'm going to ask the parties' help on this, has to do with the
11 role of Mr. Trump and the fact that the target is named
12 Trump Media and its product is Truth Social. It seems to me
13 that some of the language that the government put in its
14 opposition about the fact that this is not a case about
15 Mr. Trump and one's views about Mr. Trump and Truth Social and
16 Trump Media are irrelevant to the questions in this case is
17 something that would be important for me to tell the jurors up
18 front and perhaps also to give them that instruction and ask
19 them a question whether there is anything about the fact that
20 the target here was Trump Media and the product was
21 Truth Social that would make it difficult for the juror to be
22 fair and impartial in this case. The language is sensitive,
23 and I would ask the parties' help with respect to that.

24 So that's what I intend to do. What I would like is
25 for the parties to meet and confer with respect to proposed

O5h2Gar1

1 language and to let me know Friday at 5 p.m. either their joint
2 proposal or their competing proposals with respect to such
3 language.

4 I also intend to send the parties a copy of my
5 proposed *voir dire*. My intent is to send that to the parties
6 on April 23 and to ask for any comments and objections by
7 April 25, and then you will hear my rulings with respect to the
8 *voir dire* the morning of jury selection when we all convene.

9 Does that timetable work for the defense?

10 MR. BROD: Yes, Judge.

11 THE COURT: And for the government?

12 MS. HANFT: Yes, your Honor. Thank you.

13 THE COURT: Okay. The next thing are the government's
14 motions *in limine*. I have got one or two questions for the
15 defense, and then I will hear from the government, which didn't
16 have an opportunity to respond.

17 MR. SHAHABIAN: Your Honor, before we get to the
18 motions *in limine*, there was a development this morning that
19 relates to the presence-of-counsel motion *in limine*, and I am
20 happy to educate the Court before we go further, or if the
21 Court wanted to go out of order, I can sit down and wait.

22 THE COURT: Why don't -- that's going to be the next
23 thing after I get to the questions about the F.B.I./DOJ
24 investigation, the pending SEC investigation, the Florida state
25 court, and the SEC settlement.

O5h2Gar1

1 One question for, I guess, the government is the
2 extent to which you need a ruling on that motion right now or
3 whether you are just alerting me to the issue. Mr. Orlando
4 hasn't testified, and to some extent the question of what is
5 permitted in terms of cross-examination is difficult to answer
6 until we know what he is going to say.

7 MS. HANFT: Your Honor, the government understands if
8 the Court wants to defer determination of the motion until the
9 point that it is clear what that witness is testifying to. We
10 have also -- we should let the Court know we alerted defense
11 last night that we may not call Mr. Orlando. We are currently
12 assessing. It is relevant to other witnesses, too, to the
13 extent defense wants to question members of the board of
14 directors of DWAC, a few of whom will be testifying, you know,
15 about the -- sort of this disclosure aspect about statements in
16 DWAC's S-1, regarding preselection of a target, so it's
17 relevant to those witnesses, too, but it doesn't seem necessary
18 that the Court make a final ruling right now, and we understand
19 the Court's hesitation to do so.

20 THE COURT: Mr. Bach, why don't you tell me how, you
21 know, any of the allegations in the state court lawsuit go to
22 bias or to any of the other issues in the case, and the same
23 thing with respect to the SEC order.

24 (Counsel confer)

25 MR. BACH: So, Judge, Mr. Orlando has been the

O5h2Gar1

1 subject -- I know the Court knows this, but of numerous
2 lawsuits and numerous government investigations and there have
3 been very substantial questions raised about how he presented
4 the SPAC both to the SEC and to potential investors. One of
5 the questions at the heart of this case is the legitimacy of
6 naming and identifying a probable SPAC target before the SPAC
7 is IPOed.

8 Here, I think the evidence will be clear that
9 Mr. Orlando used Trump again and again as a calling card for
10 this SPAC when he met with potential investors, when he was
11 trying to raise money for it, all pre-IPO, despite the legal
12 prohibitions on having a target before the IPO, legal
13 prohibitions about identifying and disclosing targets at this
14 stage. And he walked a very fine line, aware that he was
15 dancing with immense legal risks and legal questions hanging
16 over his head.

17 So he would sometimes -- I mean, I don't want to get
18 into the entire defense here, but I think it will be very clear
19 that he tried to justify what he was doing in relation to legal
20 lines that he was clearly aware of and he had at least two
21 SPACs that he was in charge of and pushing at the time. One
22 was called Benessere and one was called DWAC.

23 And Benessere had, as I understand it, gone well along
24 the path of substantial discussions with Trump Media Group
25 about the possibility of Trump Media Group being a target of

O5h2Gar1

1 the Benessere SPAC. I think that's undisputed. There were
2 many, many discussions. It was well in the works.

3 And when Mr. Orlando put on his DWAC hat, instead of
4 his Benessere hat, he took the position that DWAC, even though
5 it was the same guy, the same people, supported by some of the
6 same consulting groups, he would say DWAC has had no
7 discussions whatsoever with Trump Media group. We have had
8 nothing to do with them because, as a SPAC, we are not allowed
9 to engage before the IPO.

10 And he was in charge of the company at the time that
11 submissions were made to the SEC in which it was said in no
12 uncertain terms DWAC has had no substantial discussions with
13 Trump Media Group, and this -- DWAC wound up paying \$18 million
14 in penalties to the SEC based on that fine line. Because one
15 can't just say I was talking in one hat when I meant to be
16 talking under another hat, and the SEC has rejected that.
17 There is an SEC order, as I understand it, that rejects that.

18 THE COURT: I have read the SEC order. You submitted
19 it to me.

20 MR. BACH: So what the government wants to do here,
21 it's clearly on the fence, the government is clearly on the
22 fence about whether they want to call Mr. Orlando I think
23 because of these issues. And in a moment we will talk about
24 why we think it is important to get a ruling now rather than at
25 trial. I will address that in a second.

O5h2Gar1

1 But it's very important when -- if they do call
2 Mr. Orlando that we be able to -- if he is just going to stand
3 up and say, This is where I drew the lines, this is how I
4 conducted myself, and we can't show that serious questions have
5 been raised about whether that was compliant and legal, it
6 already presents in a false light. And at the very least, we
7 should be able to cross-examine him and say, wait a sec. The
8 SEC is investigating you. There was a penalty based on that.
9 You were investigated under that. In fact, you are still under
10 investigation. So you have to answer your questions in a way
11 that is not necessarily the answer that you might otherwise
12 give, but you are biased in terms of having to articulate a
13 narrative here, you have a motive to articulate a narrative
14 that gets you between Scylla and Charybdis of this host of
15 allegations that have been made against you not only by the
16 government and regulatory organizations, but by other board
17 members and by Trump Media Group and others who have said that
18 your behavior -- and part of our defense --

19 THE COURT: Let's break this apart a little bit
20 because you have got a whole bunch of different things that you
21 have raised one, that the -- that the government has raised.
22 One is the state court lawsuit. Everybody in Trump Media is
23 fighting everybody else over the spoils or the diminishing
24 spoils. There is a whole bunch of stuff in that lawsuit about
25 breach of fiduciary duty and all kinds of stuff that arises

O5h2Gar1

1 after the IPO, after the trades that are at issue in this case,
2 claims that he breached his fiduciary duty because he has
3 demanded more than he is entitled to.

4 I assume that all of that is irrelevant because none
5 of that -- he doesn't have a motive to gear his testimony one
6 way or the other with respect to the -- what's in the state
7 court lawsuit. I didn't see anything in the state court
8 lawsuit, but maybe you have something that you can point me to
9 where his testimony here might be -- might go one way or the
10 other because of his fear of liability in the state court
11 lawsuit.

12 MR. BACH: Well, I think there are numerous
13 allegations. We certainly --

14 THE COURT: Paragraph of the state court lawsuit.
15 Which one?

16 MR. BACH: There is one in Florida. There is one in
17 Delaware.

18 THE COURT: You gave me the Delaware -- you gave me
19 one of the complaints, so tell me which paragraphs. I mean --

20 MR. BACH: I don't know if I can do that on the spot.

21 THE COURT: Then I can't rule on the spot.

22 MS. HANFT: Your Honor, I think they may be referring
23 to paragraph 51.

24 MR. BACH: Yes. 51 is the one in which this is the --
25 51 is one in which there is an allegation that Mr. Orlando

O5h2Gar1

1 leaked confidential business information to the press for his
2 own personal benefit and without benefit to DWAC's shareholders
3 and that this is the allegation that Mr. Park raised to the
4 Court the other day.

5 THE COURT: I saw that. It's not clear to me the role
6 that plays in the state court lawsuit. I saw that allegation.

7 MR. BACH: And --

8 THE COURT: So I take it you want to -- if he -- your
9 point is he has to say that he didn't leak information because
10 if he did leak information then that would establish -- that
11 would tend to contribute to liability in the state court case,
12 is that right? Just take me through the way in which it -- you
13 know, this would tend to establish bias that the fear of
14 collateral liability would tend to influence his answer to a
15 question.

16 MR. BACH: Well, I think -- and, again, there are
17 allegations in the lawsuit that he was dishonest, that he stole
18 money, that engaged in a -- we will be judicious in what
19 questions we ask. We are not going to bring in everything but
20 the kitchen sink here. But I think that in terms of leaking,
21 in terms of his honesty and credibility --

22 THE COURT: So we have got paragraph 51.

23 MR. BACH: Paragraph 30, I think I already shared with
24 the Court, relates to the payment of the \$18 million penalty,
25 so the state court proceedings raise that issue as well.

O5h2Gar1

1 THE COURT: DWAC decided to pay \$18 million?

2 MR. BACH: Yes.

3 THE COURT: Did Mr. Orlando -- was he on the board
4 when they's agreed to pay the 18 million? Does anybody know?

5 MR. BROD: With leave, Judge, I believe that
6 Mr. Orlando remained on the board and may even officially have
7 remained on the board until just a few weeks ago. He refused
8 to resign.

9 MS. SHAPIRO: Your Honor, can I just make a couple of
10 points? I take your Honor's point about --

11 THE COURT: You know, Ms. Shapiro, it's not like, you
12 know, you ask everything and Mr. Bach is arguing, so pass him a
13 note. If you want a ruling, you've got to tell me what
14 specifically. You can't just say, well, there is a state court
15 lawsuit against him, therefore we get to cross-examine him
16 about everything in the state court lawsuit. No, we are not
17 going to cross-examine him about everything in the state court
18 lawsuit, but I'm not going to tell you what I am going to
19 cross-examine him about. So if you want a ruling, you've got
20 to be a little bit more particular.

21 MR. BACH: Judge, judge, to be honest, I didn't come
22 here expecting to have to recite the particulars of our
23 cross-examination and there is a superabundance of 3500
24 material relating to Mr. Orlando, a huge amount, and we don't
25 even know if the government is now planning to call him. So

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1 it's hard for me to sit here and on the spot recite the
2 specific questions that we have.

3 What we are objecting to is the concept that there is
4 a blanket prohibition against raising these issues. That seems
5 to us fundamentally unfair and highly unusual. We understand
6 that the Court can rule on the spot that something is
7 irrelevant or cumulative or unnecessary. We totally understand
8 that. I don't want to --

9 THE COURT: So maybe I can cut this short, Mr. Bach,
10 because now I understand the point a little bit better. Let me
11 express a preliminary view and then see if there is a response
12 to it.

13 I don't think the law would support a categorical
14 exclusion of cross-examination of Mr. Orlando on the basis that
15 there -- the allegations in the complaint are just allegations.
16 In other words, it does seem to me to be proper
17 cross-examination if Mr. Orlando testifies and if he were to
18 testify in a way that implicates one of the allegations in the
19 state court lawsuit, for example, that -- and if his -- if the
20 evidence is such that the state court lawsuit would expose him
21 to liability if he answered the question here a different way,
22 then it seems to me the defense can say to Mr. Orlando, you
23 know, you are being sued in state court, do you understand you
24 have faced potential liability in that case, it could be huge
25 liability, and you had to answer the question in a particular

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1 way because if you answered it differently, you would be
2 exposed to monetary liability in that case. That seems to me
3 to be potentially subject to 403 proper cross-examination.

4 Let me see if there is a dispute from the government
5 with respect to that. In other words, there is no categorical
6 exclusion.

7 MS. HANFT: I think the way your Honor has articulated
8 is correct. The issue is that counsel should at least be able
9 to proffer a basis for why the specific statement by
10 Mr. Orlando would expose him to liability. And so if it's
11 entirely collateral to what he is testifying about, then there
12 is no reason to introduce the existence of the civil suit.

13 THE COURT: Then the next question is the question of,
14 Mr. Bach, I assume it's the question of whether you could
15 cross-examine on the fact that Mr. Orlando was still being
16 investigated by the SEC.

17 MR. BACH: Correct, and whether there are dishonest
18 statements.

19 THE COURT: Well, whether there are dishonest
20 statements may depend upon what your proffer is with respect to
21 the dishonest statements. It may be that that is proper
22 cross-examination. It may be that that's not proper
23 cross-examination. It's hard to rule on that in a vacuum.

24 MR. BACH: Yeah, but in terms of the SEC, I think it
25 falls within the paradigm that the Court just articulated.

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1 Obviously we will have to lay a foundation and it will depend
2 on his direct testimony, but I assume that it will come up
3 either on his direct or on his cross-examination that he is
4 still under investigation by the SEC, that some of the answers
5 he is providing will be at the heart of questions raised in
6 that investigation, and that he has to answer in certain ways
7 in order to spare himself exposure and liability. I think it's
8 inevitable that that paradigm will come into play here.

9 THE COURT: I take it what -- but tell me, correct me
10 if I am wrong, is that the paradigm is that the implication is
11 that here he will testify he tried to keep the information
12 confidential, it was confidential, and he didn't leak it all
13 over the place, and you would like to cross-examine him on the
14 fact that if he did leak it all over the place, he is going to
15 expose himself to SEC liability, is that it?

16 MR. BACH: No. This has more to do with what I was
17 talking about before. It has to do with the way that he was
18 promoting the SPAC and using the name Trump Media Group, which
19 will be the central focus of this case.

20 And what you are going to hear, Judge, is there were a
21 series of meetings in which Mr. Orlando spoke to many of the
22 witnesses in this case, many of the people who participated in
23 the founders' round of the SPAC and talked to them about Trump
24 Media Group and he talked, broadly speaking, about Trump Media
25 Group as a target, potential target of the SPAC and he talked

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1 about his connections to Trump, and at the same time he has
2 taken the position, even though this is inherently improper and
3 wrong and is not a way that one can promote a SPAC because you
4 can't have a preidentified target, he has taken the position,
5 including in his S-1 and other public filings, and I think this
6 is the subject of the SEC lawsuit, that what he was doing was
7 okay because he was not having any -- he claimed not to be
8 having had any substantive conversations with DWAC. So he has
9 minimized, minimized and shaded what he did here.

10 THE COURT: So but because he -- in the SEC
11 investigation, your view is he said he did all of that wearing
12 the Benessere hat and not the DWAC hat --

13 MR. BACH: For instance, Judge --

14 THE COURT: No. Just answer my question, not a --

15 MR. BACH: That's part A.

16 Part B is that he is going to say: I downplayed
17 Trump. I said it was just something in the pipeline. It
18 wasn't a real -- I didn't present it as a potential target. He
19 is going to say that, and we don't think that's true. We think
20 he was pumping up Trump and he made clear it was a potential
21 target and he had ways of doing that and that he has had to toe
22 a different line in the SEC case and in his -- we anticipate he
23 will toe that different line in his courtroom testimony because
24 he is exposed to liability in the SEC case. He can't admit
25 that he was jumping up and down about Trump.

O5h2Gar1

1 THE COURT: Why don't you address why you need a
2 ruling now on the hypothetical that Mr. Orlando is going to --
3 may testify before you open because you haven't so far
4 convinced me that I can grant your motion *in limine* without
5 knowing what Mr. Orlando is going to say or how the evidence
6 that you would like to mention would go to his bias.

7 MR. BACH: Because, Judge -- I understand the Court's
8 question, and I want to educate the Court just a little bit.

9 There is a huge amount of Orlando material that's been
10 presented to us. He was at the heart and center of this
11 effort. And we don't know whether the government plans to call
12 him or not. At 11:30 last night or 10:30 last night, which I
13 didn't see until this morning, after spending a few days
14 preparing, wading through that material, we learn that now they
15 might not be calling him. Okay?

16 We briefed a 404(b) motion on taxes only to find out
17 that they are withdrawing it.

18 We have spent a lot of time and resources on what
19 turns out to be false starts in this case. And if they are not
20 going to call -- today was -- last night was when they were
21 supposed to present their final witness list. And if they are
22 not going to call Mr. Orlando, we need to know now because we
23 don't want to spend days and days going through that material,
24 preparing a cross-examination, trying to convince the Court
25 that we can open on it, trying to lay a foundation, if they are

O5h2Gar1

1 not in fact planning to call him. It's a tremendous amount of
2 work.

3 We are down to one law firm in this case. We have to
4 cover witnesses that have nothing to do with Bruce Garelick now
5 that relate to the other clients who were formerly part of this
6 process, and it's unfair, just as a matter of time and
7 resources and trial prep, to hear at the last minute that they
8 might not be calling Mr. Orlando, they haven't decided, and
9 that we have to kind of prepare a substantial cross and be able
10 to give the Court a basis for this if they are not planning to
11 call him. So if they are planning to call him, I understand
12 that the Court prudently wants a little more context before
13 making rulings and the Court has kind of said what its general
14 attitude towards this evidence will be, and I appreciate that.
15 But I think --

16 THE COURT: I think it's generally consistent with the
17 principles of law --

18 MR. BACH: Of course.

19 THE COURT: -- that you laid out but not necessarily
20 with the application.

21 MR. BACH: Understood. And Judge, I can't disagree
22 with that. I mean, I understand where the Court is coming
23 from.

24 What I want to emphasize to the Court is the
25 tremendous amount of work in a very compressed time frame in

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1 which we really don't have much time at all. We have a lot of
2 3500 material. There are other issues that we want to raise
3 with the Court that have come up, and I just think the witness
4 list was due yesterday. We should know very fast whether
5 Mr. Orlando is going to testify or not because I would like to
6 write my opening statement. I want to prepare
7 cross-examinations. I don't want to do a lot of work on
8 Orlando if he is not going to testify.

9 THE COURT: Okay. The motion *in limine* to exclude
10 evidence with respect to the F.B.I./DOJ investigation, the
11 pending SEC investigation, Florida state court lawsuit, and the
12 SEC settlement, I'm going to reserve decision on that. In
13 other words, I am going to deny the motion *in limine* which asks
14 for a pretrial ruling with respect to those issues because the
15 parties are not entitled to *in limine* rulings and particularly
16 because *in limine* rulings are discouraged in circumstances
17 where the admissibility of the evidence on cross-examination
18 may depend upon what is offered on direct examination. So I
19 think that that resolves that issue.

20 The next issue is --

21 MS. HANFT: Your Honor, may I just respond to
22 Mr. Bach's statement because I just want to make clear that the
23 government is acting in good faith.

24 We have been spending our time, as well, preparing
25 witnesses, including Mr. Orlando, and so we, too, have no

O5h2Gar1

1 incentive to waste time on a witness we don't intend to call.
2 In the interests of being totally transparent with defense, we
3 let them know last night that we were not certain that we would
4 call Mr. Orlando. In parallel with submitting our witness
5 list, we provided that information. So we were attempting to
6 give defense, you know, as much guidance as we could. We
7 routinely cut witnesses as we approach trial. So we are acting
8 in good faith and take issue with any suggestion that we are
9 not.

10 THE COURT: It's also not unheard of for parties to
11 cut witnesses during the trial after they see how their
12 witnesses have performed.

13 All right, the next issue is -- has to do with the
14 presence of counsel defense and, Mr. Shahabian, you had
15 something to raise on that.

16 MR. SHAHABIAN: Yes, your Honor. If I could approach
17 your deputy with a copy of a production we received this
18 morning from Rocket One, I will provide a copy to the defense
19 as well.

20 THE COURT: Give me one moment to look at it.

21 MR. SHAHABIAN: Of course, your Honor.

22 THE COURT: Okay.

23 MR. SHAHABIAN: So, your Honor, this is the first the
24 government has ever seen this e-mail. It was previously marked
25 privileged by Rocket One in connection with the original

O5h2Gar1

1 productions to the SEC and the Department of Justice. This
2 morning we received this production.

3 I called counsel for Rocket One and asked was this
4 inadvertent? Are you waiving privilege that you previously
5 asserted? The response I received is that they were waiving
6 privilege just as to this e-mail. I said, Are you sure that
7 you are raising a selective privilege as to a single e-mail and
8 to nothing else that you have withheld as privileged?

9 We then received an e-mail communication saying
10 actually this document never should have been marked privilege,
11 and we realized it was inadvertently marked privileged and we
12 are now producing it to you.

13 There are still additional documents that Rocket One
14 has marked as privileged that relate to this conversation,
15 including notes that appeared to have been taken by Michael
16 Park after his conversation with Bruce Garelick, that we have
17 not seen.

18 This is exactly what the government has been warning
19 about for months since we first raised the issue of providing
20 notice of an advice or presence of counsel defense. We raised
21 it in open court when we were here before your Honor and
22 defense counsel said they were not intending to raise such a
23 defense. We briefed a motion *in limine* saying we should
24 preclude any mention of presence of counsel, given the
25 representations we have received. And now this morning we

O5h2Gar1

1 received this e-mail from -- of what appears to be a selective
2 waiver of privilege for the first time.

3 (Continued on next page)

O4HKGAR2

1 MR. SHAHABIAN: (Continuing) So what the government
2 is requesting in connection with our motion in limine is,
3 first, a finding that Rocket One has waived its privilege with
4 respect to these communications, and we should obtain the
5 additional communications that they continue to withhold as
6 privileged.

7 We also reiterate our request in the motion in limine
8 that defense should provide a detailed factual proffer of any
9 presence-of-counsel defense they intend to assert at trial,
10 such that the parties have notice and sufficient time to brief
11 for the Court the potential 401 and 403 issues this raises.
12 For example, as the Court is aware, in the Bankman-Fried trial,
13 Judge Kaplan heard the proposed presence-of-counsel defense
14 outside the presence of the jury before making rulings on what
15 could be presented to the jury --

16 THE COURT: During the course of the trial?

17 MR. SHAHABIAN: Correct. But that was after a notice
18 had been given, such that the parties could brief it and
19 discuss the proposed -- discuss the proposed procedure before
20 getting to that issue in the trial. This is why we've been
21 raising this issue from the beginning, to avoid this kind of
22 late breaking surprise or potentially derail the presentation
23 of evidence to the jury. So that is why we filed the MIL, and
24 here we are with this morning's production.

25 THE COURT: So on the request for a ruling that

O4HKGAR2

1 Rocket One has waived, how can I do that without the presence
2 of Rocket One counsel here? I'm prepared to hold a hearing
3 next week with counsel for Rocket One, if you want to bring on
4 a motion to compel the production of documents that you've
5 subpoenaed, but I don't see how I can do it without
6 Rocket One's counsel being present and having an opportunity to
7 be heard and without there being maybe some briefing.

8 MR. SHAHABIAN: Yes, your Honor, that's fine. And we
9 can discuss a proposed schedule with the Court after we talk
10 with counsel for Rocket One. So with respect to that, I think
11 we'll ask for a prompt ruling on that.

12 In addition, we know the Court has set the deadline
13 for the defense production of exhibits for, I believe it's,
14 this Saturday, and we would anticipate any additional documents
15 they intend to rely on in connection with the
16 presence-of-counsel defense will be produced on Saturday.

17 MS. SHAPIRO: Your Honor, may I respond?

18 THE COURT: Yes.

19 MS. SHAPIRO: I think it's quite clear on the face of
20 this document that this is not privileged. Mr. Garelick is not
21 asking for any advice of Mr. Park. He's writing to him in his
22 capacity as his compliance officer. And Mr. Garelick and his
23 counsel have not been involved, and are not privy to, whatever
24 other documents Mr. Shahabian is referencing that appeared on
25 some privilege log that we've never seen.

O4HKGAR2

1 So I don't think there's any need for additional
2 hearings on this matter. We don't know what other documents
3 he's even talking about. And on the face of it, this
4 particular document, which we were aware of, is not privileged.

5 So we don't think there's any need to hold a hearing
6 about waiver. We're not asserting an advice-of-counsel
7 defense. We've been very clear on that. There's no nonsense
8 going on here, and this is just a distraction. I think this
9 email, which the government now has and which was going to be
10 on our exhibit list, is the only document we're really talking
11 about, and it doesn't represent any advice of counsel. It's an
12 email Mr. Garelick wrote to the compliance officer. He's not
13 asking for legal advice. He's simply informing him of certain
14 facts.

15 THE COURT: Can you let me know, Ms. Shapiro – and
16 maybe this is a question to Mr. Bach – the extent to which you
17 intend in your opening to raise issues about the presence of
18 counsel.

19 MR. BACH: I don't believe I plan to refer to counsel.
20 But there are -- not to counsel, no.

21 THE COURT: Mr. Shahabian, a couple of things:

22 First of all, I think there is some force to what
23 Ms. Shapiro says about this document looking like it's a
24 compliance document and not a privilege document, but I'll
25 permit you to make a motion as against Rocket One and to brief

O4HKGAR2

1 it.

2 But, second, I realize the proposition that if I don't
3 rule right now with respect to privilege issues, it creates the
4 potential for delay in trial. That is an issue that I grappled
5 with in the Ray case. And it may be that people say that I was
6 wrong in that, and fine in arguing that, but it did reflect a
7 concern, which I do think is well-founded, that the
8 inefficiencies that may be accompanied by late-breaking
9 defenses, as long as it's not here a defense-of-counsel
10 defense, can be addressed by, if necessary, there being a short
11 break in trial, by changing the order of witnesses, by other
12 means, so I'm not requiring the defense to preview their case.

13 So maybe you can address for me, if presence of
14 counsel is not going to come up in opening, and if I now direct
15 Mr. Bach not to mention in his opening the presence of counsel
16 at any of the meetings that are at issue in this case, why I
17 should require them to make a proffer with respect to their
18 theory of defense.

19 MR. SHAHABIAN: I think that gets us a lot of the way
20 there, your Honor. I think I just want to flag one thing to
21 preview where I think this could go and why the government is
22 so concerned.

23 I would agree that this email on its face doesn't
24 reference a lawyer, it says compliance officer, but Michael G.
25 Park is the general counsel for Rocket One. He is not just a

O4HKGAR2

1 compliance officer; he is also a lawyer. And I did not make
2 the privilege call to withhold this as privileged; this was
3 Rocket One's decision to withhold this as privileged.

4 And, on its face -- and the government will plan to
5 object to the introduction of just this email as hearsay, but I
6 could see the world in which, if the defendant were to testify
7 or if he were to call Michael Park as a testifying witness, the
8 issue of Michael Park being a lawyer, such that a
9 presence-of-counsel argument will come up and be presented to
10 the jury, and as courts in this district have noted, even the
11 presence-of-counsel argument risks confusing the jury, even if
12 it's not a strict advice-of-counsel defense, because putting
13 evidence in front of the jury that a lawyer was there, a lawyer
14 was involved, a lawyer was informed, makes it seem like it was
15 legally blessed. And that gives rise to the 403 issues that
16 require this Court to carefully consider it.

17 So that's the government's concern, now that we have
18 this email and we don't know exactly where this is going. I
19 hear the Court's tentative ruling that if we eliminate it from
20 openings, that takes care of the immediate concern, but I just
21 want to preview for the Court that it may not just be this
22 email, and that's what the government is concerned about.

23 THE COURT: Okay.

24 I do also tend to agree with the way in which
25 Judge Kaplan phrased the issue in Bankman-Fried, I think

O4HKGAR2

1 Judge Kaplan got it exactly right, and that would be the
2 framework that I will apply if this issue comes up.

3 For now, I'm addressing the issue by directing the
4 defendant to do what defense counsel said he was planning to do
5 anyway in his opening, which is not to mention the presence of
6 counsel as part of the defense.

7 MR. BACH: Can I just have a moment to confer on that?

8 (Pause)

9 MR. BACH: As the Court knows, I haven't crafted the
10 language of my opening yet, but one thing that I'm considering
11 is saying, you know, that Mr. Garelick policed himself, that he
12 was aware in his mind of what he could and couldn't do, and
13 that he memorialized that in writing. And I can do that
14 without referring to a compliance officer, I can do that
15 without referring to a lawyer. I don't think I should be
16 precluded from doing that. I think that's a fundamental part
17 of the defense here.

18 THE COURT: If you do that, you're going to run the
19 risk that, unless you've established a foundation for the
20 admission of this exhibit, the government is going to be able
21 to say in their closing, you heard all of these promises made
22 by the defense, and, you know, they didn't live up to their
23 promises.

24 MR. BACH: I totally understand --

25 THE COURT: People take risks.

O4HKGAR2

1 MR. BACH: I totally understand that, and that's why I
2 say I'm still crafting my opening, but I just want to be clear,
3 the line is I can't say and gave it to a lawyer. That's what
4 the Court is asking me not to do.

5 THE COURT: You can't say there were lawyers around or
6 that -- you can say what is in his state of mind --

7 MR. BACH: Okay, okay.

8 THE COURT: -- but not the presence of counsel.

9 MR. BACH: I appreciate the clarification. I just
10 wanted to make it clear.

11 THE COURT: All right.

12 Mr. Shahabian, I'm out on Monday for Passover. I'm
13 around all next week in terms of if there needs to be a motion
14 with respect to the Rocket One documents or otherwise. You can
15 just contact my deputy after consulting with the defense, and
16 we can schedule a conference.

17 MR. SHAHABIAN: Yes, your Honor. And we'll advise the
18 Court after we confer with counsel for Rocket One.

19 Just one additional issue -- and I recognize that the
20 Court may not be inclined to rule on this, given its ruling --
21 in the Bankman-Fried trial, Judge Kaplan did require pretrial
22 disclosure from the defense with a notice that included
23 description of the contours of a presence-of-counsel or
24 advice-of-counsel defense; disclosing the attorneys involved;
25 the general subject matter of the communications, the format,

O4HKGAR2

1 and the approximate dates and date ranges; whether the
2 defendant is asserting advice-of-counsel or a good-faith
3 defense based on the involvement or presence of counsel; to the
4 extent a formal advice-of-counsel defense is pursued, the
5 information provided to the attorney and the advice, if any,
6 conveyed to the defendant by the attorney; any other
7 individuals present for, or involved with, the communications;
8 to the extent communications are privileged, what type of
9 privilege applies; and all materials supporting the defense, as
10 well as any materials in the defendant's possession that would
11 tend to undermine or impeach the defense.

12 I recognize they've disclaimed advice of counsel, but
13 I think a lot of what Judge Kaplan required to be provided
14 pretrial, either through disclosure of documents or in a
15 written notice, is applicable here, and I think the government
16 would request that the defendant provide such notice by
17 Saturday with its reciprocal discovery deadline.

18 THE COURT: So was there an objection to that order by
19 Judge Kaplan?

20 MS. SHAPIRO: Your Honor, with all due respect, I
21 am --

22 THE COURT: You know the Bankman-Fried case. I
23 assume --

24 MS. SHAPIRO: There was an objection, but I expect
25 that that whole sequence of events may well be part of

O4HKGAR2

1 Mr. Bankman-Fried's appeal because the entire nature of the
2 proceeding and the rulings – and I understand what your Honor
3 said about it – but it was rather unprecedented. And I will
4 say again, for the third or fourth time, and as we indicated in
5 our opposition, there is no advice-of-counsel defense here.

6 THE COURT: Do you know, Ms. Shapiro, whether there
7 was an objection to the pretrial disclosure of that information
8 in Bankman-Fried?

9 MS. SHAPIRO: There was. There was a series of
10 briefs, it was objected to, the judge overruled the objections,
11 and then there was further notice provided in light of the
12 Court's ruling.

13 THE COURT: Okay. I'm going to deny the government's
14 request for there to be a proffer of information. I hold
15 Judge Kaplan in the highest regard, but I'm going to adhere to
16 my previously expressed views.

17 On coconspirator statements, what does the government
18 need on that in limine?

19 MR. SHAHABIAN: The government will withdraw its
20 request for an in limine ruling on that.

21 THE COURT: Okay. All right.

22 And then on the evidence regarding Mr. Garelick's
23 politics, his family background, health, age, or other similar
24 factors unconnected to guilt, Mr. Bach, Ms. Shapiro, Mr. Brod,
25 as I would come to expect, you were not particularly specific

O4HKGAR2

1 in terms of the kinds of information that you wanted to elicit
2 about Mr. Garelick's background.

3 Maybe I should ask the government: What is it that
4 you are concerned about? And then I'll ask the defense about
5 their offering it.

6 MR. SHAHABIAN: I think there are two main concerns,
7 your Honor.

8 One, connected to the jury questionnaire discussion
9 earlier, is, is any sort of argument or suggestion that because
10 of the defendant's politics or association with Trump Media or
11 Trump, that he's being targeted or persecuted or unfairly
12 prosecuted in this case?

13 And then, related to that, the more general concern
14 about arguments about sympathy and background that don't really
15 go to guilt or innocence.

16 THE COURT: So I'll ask the defense about the second,
17 and then I do have views with respect to -- on the first, it's
18 kind of a challenging issue, Mr. Shahabian, because the jury
19 will see who Mr. Garelick is. If you want to -- if you want to
20 ask a question about how old he is, I don't particularly know
21 how old he is, but I can probably guess within a range, and the
22 jury will have a view within a range. And based upon his role
23 in this case, there's going to be some facts in terms of his
24 background and education that I think is just going to
25 necessarily come out. So why don't we see how that goes. I

O4HKGAR2

1 get the issue.

2 Mr. Bach, there's not going to be an argument in this
3 case that your client is being prosecuted because this has to
4 do with Trump and Trump Media, and it's a selective prosecution
5 and politically driven, is there?

6 MR. BACH: That hasn't crossed my mind, Judge, no.

7 THE COURT: Okay. Put another way, then, it makes it
8 easy; there's not going to be any kind of argument like that.
9 And if there is, I can step in.

10 Mr. Shahabian, does that take care of it?

11 MR. SHAHABIAN: Yes, your Honor.

12 And if I could go back to the coconspirator statement.
13 My colleagues informed me I may have jumped the gun, and maybe
14 your Honor is not prepared to rule on this anyways, but we did
15 want to sensitize the Court to the issue of, for example, text
16 messages from coconspirators, such as Gerald Shvartsman, to
17 remote tippees, who then traded on the information, that those
18 are the kinds of statements that the government intends to
19 admit as coconspirator statements in furtherance of the
20 conspiracy.

21 I recognize --

22 THE COURT: The two that you mentioned being examples
23 of those?

24 MR. SHAHABIAN: Correct, your Honor.

25 And I think I take the Court's preliminary remarks as,

O4HKGAR2

1 you're not prepared to rule on that until seeing how the
2 evidence comes in, but I did want to flag that for the Court's
3 attention.

4 THE COURT: Okay. I am not prepared. My initial
5 view – but we'll see how it plays out – is that the government
6 has made the sufficient preliminary showing to be able to have
7 the evidence conditionally admitted subject to the *Gainey*
8 procedure that if it has not been established by a
9 preponderance that the statements were made in the course of
10 the conspiracy in furtherance of the conspiracy, then they will
11 be stricken.

12 Is there anything else from the government that we
13 need to address today?

14 MR. SHAHABIAN: Your Honor, there are no more issues
15 on the motions in limine. The government does have two other
16 issues to bring up, if now is the appropriate time.

17 THE COURT: Now is the appropriate time.

18 MR. SHAHABIAN: The first would be the government
19 requests that the Court allocute Mr. Garelick on the fact of a
20 plea offer having been extended and rejected and proceeding to
21 trial.

22 In addition, as a housekeeping matter, the government
23 would ask if the Court is amenable to, regardless of how long
24 jury selection takes on Monday, having our openings and first
25 witness ready to go Tuesday morning, as we have witnesses

O4HKGAR2

1 coming from out of state and want to try to make definitive
2 travel arrangements.

3 THE COURT: Okay.

4 And what are the -- refresh me as to the questions I
5 should ask in terms of allocuting Mr. Garelick.

6 MR. SHAHABIAN: I defer to my colleague, Mr. Nessim.

7 THE COURT: Maybe Mr. Garelick will also pay
8 attention, to make sure he pays attention, because I'm going to
9 ask Mr. Garelick whether he has been able to follow what the
10 prosecution has said.

11 MR. NESSIM: Yes, your Honor.

12 We would ask that Mr. Garelick confirm that he
13 received a plea offer extended to his attorneys, dated
14 March 27th of 2024. That plea offer involved a plea of guilty
15 to Count Two of the superseding indictment, and that,
16 in consideration of that plea, the defendant would not be
17 further prosecuted for the offenses in the indictment.

18 The plea agreement included a guideline stipulation
19 with an applicable guidelines offense level of 27, a criminal
20 history category of I, and a guideline sentencing range of 70
21 to 87 months.

22 Of note, the agreement also included a stipulation
23 under which the government agreed that at sentencing, it would
24 seek a sentence no greater than the lowest end of the
25 guidelines applicable to Mr. Garelick's codefendant,

O4HKGAR2

1 Gerald Shvartsman.

2 Otherwise, there are standard terms in the plea
3 agreement, but those are the major points of the agreement that
4 we would ask the Court confirm Mr. Garelick's understanding.

5 THE COURT: I also intend to make it clear to
6 Mr. Garelick that if he is convicted after trial, that there is
7 no assurance that the guidelines range that I ultimately will
8 use would be within that 70 to 87 months and that it could
9 potentially be quite higher.

10 MR. NESSIM: Yes, your Honor. So we would ask to
11 confirm Mr. Garelick's understanding and that he received that
12 offer, considered it, and rejected it.

13 THE COURT: Mr. Garelick, were you able to follow what
14 the prosecution said?

15 THE DEFENDANT: Yes, I believe I was, your Honor.

16 THE COURT: Okay.

17 And did you, in fact, receive the plea offer of
18 March 27, 2024?

19 THE DEFENDANT: Yes, I did. I think my only potential
20 confusion is, is there's some argument whether -- upon the
21 admissibility of that plea agreement into the actual trial?

22 THE COURT: No. Why don't you just follow the
23 questions --

24 THE DEFENDANT: Sure. I'm sorry.

25 THE COURT: -- that I'm asking because it doesn't have

O4HKGAR2

1 to do with the admissibility of the plea agreement at trial.

2 But I do want to make sure that you received the plea offer?

3 THE DEFENDANT: Yes, your Honor, I did.

4 THE COURT: And you understood that the government was
5 offering you a plea to Count Two of the superseding indictment,
6 and that, in consideration of that plea, if you accepted it,
7 that they would dismiss the other counts against you, and that
8 you would not be further prosecuted for the offenses charged in
9 the indictment and the superseding indictment?

10 You understood that?

11 THE DEFENDANT: Yes, your Honor, I understood that
12 very well.

13 THE COURT: Okay.

14 And there was also a guidelines stipulation contained
15 in that plea agreement, which had a guidelines range of 70 to
16 87 months and an agreement by the government that you would not
17 be sentenced to --

18 Mr. Nessim, say it again?

19 MR. NESSIM: The agreement was the government agreed
20 not to seek a sentence higher than the lower end of the
21 guidelines applicable to Codefendant Gerald Shvartsman.

22 THE COURT: The government agreed not to seek a
23 sentence higher than the lower end of the guidelines applicable
24 to Gerald Shvartsman; you understood that?

25 THE DEFENDANT: Yes, your Honor, I understood that.

O4HKGAR2

1 THE COURT: Okay.

2 And do you understand that by going to trial, first of
3 all, that plea offer is off the table?

4 THE DEFENDANT: Yes, I understand that.

5 THE COURT: And that it's quite possible that, after
6 trial, if you end up being convicted, that, first of all, I
7 will calculate the guidelines, and that the guidelines may be
8 quite a bit higher than that to which you were offered in that
9 plea agreement?

10 THE DEFENDANT: Yes, your Honor, I understand that.

11 THE COURT: Okay. And I take it you discussed the
12 plea offer with counsel; is that right?

13 THE DEFENDANT: Yes, confirmed.

14 THE COURT: Before you made the decision?

15 THE DEFENDANT: Correct.

16 THE COURT: Anything further from the government on
17 that issue?

18 MR. NESSIM: No, your Honor.

19 THE COURT: Okay.

20 Any objection from the defense to starting openings on
21 Tuesday morning?

22 MR. BACH: None, your Honor.

23 THE COURT: Okay.

24 Anything else from the defense?

25 MS. SHAPIRO: Yes, your Honor, a few things.

O4HKGAR2

1 We received the government's witness list, as Mr. Bach
2 indicated, late last night, didn't see it really until this
3 morning, and there are a number of people listed that aren't
4 actually people, so we don't even have all the names. And I
5 want to talk about that a little bit. I think there were three
6 or four representatives of organizations that are listed.

7 And, in addition, in connection with those, it seems
8 like a few days ago, we received a production and a Rule 404(b)
9 notice that was after the deadline, although the government
10 disclaimed that there was 404(b) evidence, but they referenced
11 404(b) in their letter relating to compliance policies that
12 were put in place by former employers of Mr. Garelick which are
13 more than ten years old. And we haven't had a chance to fully
14 digest all of this, but we've taken a glance at some of the
15 compliance policies, and we think that they should not be
16 admitted at trial. They are, as compliance policies often are,
17 vastly overinclusive and not accurate as to the same law that
18 the Court is going to instruct the jury on.

19 This is not a case where the defense is not -- where
20 it's going to be disputed that Mr. Garelick is an experienced
21 financial professional, who knew what material nonpublic
22 information was, but these policies, for instance, contain
23 inaccurate definitions about what is materiality, they prohibit
24 any trading on material nonpublic information without
25 discussing duties, personal benefit, various other elements,

O4HKGAR2

1 and they're completely misleading, and it's almost akin to if
2 the Court were to allow a legal expert to tell the jury what
3 the law of insider trading says.

4 So, we think those documents should be excluded. We
5 don't know what witnesses they plan to call or what testimony
6 they plan to elicit with respect to those issues, they haven't
7 even given us the names, but we think all of that should be
8 excluded. We're prepared to move in limine, if necessary, file
9 a brief on this, but I wanted to alert the Court to that.

10 There are other issues that have come up in connection
11 with the 3500. For instance, there are a number of witnesses
12 in the 3500 who make statements about their own understandings
13 about whether you could trade, whether this was material
14 nonpublic information, board members and others, and the issue
15 at this case at trial is going to be what was Mr. Garelick's
16 state of mind, and all of that is irrelevant and subject to
17 Rule 403, confusing, it's going to mislead the jury.

18 So there are other issues. They produced on their
19 exhibit list this morning, according to my colleagues, mugshots
20 of the Shvartsmans, so now the jury is going to be told that
21 they were arrested and shown their mugshots, and of
22 Mr. Garelick.

23 So to extent the Court could provide a guidance
24 particularly as to this compliance policy issue, because based
25 on the number of witnesses, it looks like the trial is going to

O4HKGAR2

1 be a lot longer, and it's going to be a frolic and detour about
2 past compliance policies at jobs Mr. Garelick held more than
3 ten years ago, and we would like some guidance on that now. I
4 recognize that I'm just bringing this up now because we just
5 learned about this.

6 THE COURT: You've raised a whole bunch of things, but
7 it seems like you're focused on the compliance policies. I'll
8 hear from the government, but, ordinarily, things like
9 compliance policies can be received, and your concern is taken
10 care of by me giving the jury an instruction as to the limited
11 purpose for which the compliance policies were being received,
12 and that with respect to what is material nonpublic
13 information, that is to come from me, in my charge, and not
14 from any compliance policy.

15 MS. SHAPIRO: I understand that, your Honor, but, with
16 all due respect, I think when you see the policies in this
17 case, you're going to understand why that's just not going to
18 work, and it just simply doesn't make any sense. We're happy
19 to put in a brief on this. What I would ask the Court to rule
20 on today is I would ask the Court to direct the government to
21 give us the names of the actual witnesses they plan to call and
22 any 3500, because they have not provided any of that.

23 THE COURT: So why don't you tell me, since I don't
24 have the witness list, what are the witnesses who are not
25 actually people that you are complaining about?

O4HKGAR2

1 MS. SHAPIRO: Okay, hold on. I apologize, your Honor,
2 I saw this on my phone on the way in. So Adage Capital
3 witness, DTCC witness, Fidelity witness --

4 THE COURT: Slow down.

5 ATG, is that what you said?

6 MS. SHAPIRO: Adage, A-d-a-g-e. It's witness number
7 one on their list.

8 And then number 3, DTCC; number 4, Fidelity. I expect
9 that Fidelity -- the government can correct me if I am wrong --
10 that one is probably related to the trading in this case --

11 THE COURT: And I would assume the DTCC also is, but,
12 you know...

13 MS. SHAPIRO: 14, Saba Capital witness; and 20, Virtu
14 witness.

15 But, your Honor, we'll put in a letter on these
16 issues.

17 THE COURT: No, you asked me for a ruling, so I may be
18 able to address it.

19 On DTCC and Fidelity, it sounds to me like those are
20 document custodians. Is that wrong? Maybe you can even agree
21 in a stipulation with respect to what comes in from DTCC and
22 Fidelity. Is it trading records?

23 MR. NESSIM: Your Honor, I think some of these are
24 just document custodians. They're all relatively short, you
25 know, corporate witnesses. We're in the process of identifying

O4HKGAR2

1 the names of these people, and once we have them and 3500
2 material responsive relating to those witnesses, we'll produce
3 that immediately. We're not trying to hide the ball here.
4 These are all witnesses who will speak to whether these are
5 corporate records or corporate policies or venue-related
6 issues. And I think all of these witnesses will give brief
7 testimony. And it's not as if we're sitting on 3500 material,
8 sitting on names that we haven't produced; we're actively in
9 touch with counsel for all these entities to identify the
10 person, and defense counsel will have that effectively as soon
11 as we do.

12 MS. SHAPIRO: Your Honor, just to be clear, when I
13 said we're going to submit a letter, I meant on the old
14 outdated compliance policies. And we're going to do that. We
15 want to protect the record on that, even if your Honor has
16 prejudged it, which I hope you haven't.

17 THE COURT: I have not prejudged it.

18 MS. SHAPIRO: Just to be clear, none of this has
19 anything to do with DWAC; it's all old stuff.

20 THE COURT: I had understood that.

21 MS. SHAPIRO: I think that's it. We'll raise the
22 other issues after we have a chance to digest the exhibit list,
23 and we'll put in a letter.

24 THE COURT: Okay. All right.

25 MR. BACH: Can I just confer with the government for

O4HKGAR2

1 one second?

2 (Pause)

3 MR. BACH: Judge, we're asking for a ruling that the
4 government let us know before opening statements where they are
5 at least leaning in terms of calling Mr. Orlando or not. He's
6 such an important witness, that, as the Court noted, there are
7 risks in opening statement. The purpose of a witness list is
8 so that defense counsel can have some notice of witnesses to
9 anticipate at the trial. There's clearly a lot of time between
10 now and the trial for the government to consider and decide
11 whether to call Mr. Orlando or not, and I think it's only fair
12 that they give us an indication of where they are on that
13 before we open in this case.

14 THE COURT: What I'm prepared to do is not quite that,
15 but it's to require the government by some date prior to
16 opening statements to indicate to the defense whether they
17 intend to open with the representation that Mr. Orlando is
18 going to be testifying, so that in the defense opening
19 statements, the defense can be prepared to address that, given
20 his importance.

21 And Mr. Shahabian or whoever wants to answer that from
22 the government?

23 MR. NESSIM: Your Honor, we can say right now that we
24 will not be representing that Mr. Orlando will be testifying in
25 our opening statements.

O4HKGAR2

1 THE COURT: Okay.

2 That's what I'm prepared to do. That's the most I'm
3 prepared to do, Mr. Bach.

4 MR. NESSIM: Your Honor, can I just add one thing to
5 clarify my earlier statement about some of these custodial or
6 corporate witnesses? The Saba witness is slightly distinct
7 from the purposes I identified. Saba is a hedge fund that had
8 a position in DWAC's SPAC and sold it once they learned about
9 the merger, once it was publicly announced. And so they would
10 be testifying as to the nonpublic nature of the merger target,
11 but still sort of the same nature in terms of length of
12 testimony and role.

13 THE COURT: Who is 20, Virtu?

14 MR. NESSIM: Virtu is related to some of the
15 counterparties to the trades -- or executing broker, excuse me,
16 on some of the trades that Mr. Garelick placed.

17 THE COURT: And Adage?

18 MR. NESSIM: Adage is his prior employer. That is
19 where the compliance manuals come from.

20 THE COURT: Okay.

21 I would like the 3500 material from the government in
22 the witness list that was produced. Maybe you can email me the
23 witness list that was produced on the 3500 material. As soon
24 as possible, can you get it to me? It would be useful if you
25 can get it to me in PDFs that are bookmarked so that I can pull

O4HKGAR2

1 it up on my screen and then just click on the bookmark to get
2 to the relevant 3500 material.

3 MR. SHAHABIAN: We'll take care of that, your Honor.

4 THE COURT: Anything else from the government?

5 MR. NESSIM: As we make rolling updates of 3500
6 material, should we also produce that to the Court on a rolling
7 basis?

8 THE COURT: Yes.

9 Ms. Shapiro?

10 MS. SHAPIRO: Your Honor, I don't think we have
11 anything else.

12 There is one other matter unrelated to this case that
13 we were hoping after we conclude — we've discussed this with
14 the government, and they're welcome to join us — we wanted to
15 come to the sidebar and raise with your Honor. It doesn't
16 relate to this case.

17 THE COURT: Okay. I'm fine with that.

18 So we're concluded.

19 MS. SHAPIRO: Thank you, Judge.

20 (Adjourned)